NO. 89-1474

In the Supreme Court of the United States

OCTOBER TERM, 1989

McDERMOTT INTERNATIONAL, INC.
Petitioner,

versus

JON C. WILANDER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF McDERMOTT INTERNATIONAL, INC.

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QUESTION PRESENTED

Is this an appropriate case for reconsideration of this Court's two prior decisions declining to review the rule for determination of seaman's status set forth by the Fifth Circuit Court of Appeal in *Barrett v. Chevron, U. S. A., Inc.*, 781 F.2d 1067 (5th Cir. 1986)?

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STATEMENT OF THE CASE

Because of petitioner's omission from the statement of the case of certain critical facts, it is necessary for respondent to supplement said facts in the following respects.

First of all, petitioner does not detail many of the connections between the parties in this case and the United States, which were relied upon by the courts below in holding that American law should provide the rule of decision herein. At the time seaman Wilander began his employment with petitioner McDermott International, Inc., that company was wholly owned by McDermott, Inc., an American corporation. On the date of the injury to Wilander, both companies maintained their principal places of business in New Orleans, Louisiana.

While working in the Persian Gulf, McDermott utilized the services of the Derrick Barge 9, a vessel which acted as a home base for Wilander and his crew. This vessel was owned by McDermott, Inc. (an American corporation) and built in the United States. Four other vessels were used in connection with the work supervised by the DB 9, one of which was the GATES TIDE. This was an American flag vessel which was chartered to McDermott International.

The GATES TIDE, to which Wilander was assigned, was out-fitted to serve as a "paint boat" for Wilander and his crew, and was essential to the performance of their duties. Wilander and his crew ate, slept and worked on this vessel, which housed all their equipment.

Wilander worked on ninety-day hitches, during which time he never came ashore. All of his work was per-

formed over the water, subject to the perils of the sea. As supervisor of the painting crew, Wilander conducted his supervision from the vessel, while his crew worked on the platforms. Large equipment, such as compressors, would stay aboard the vessel while the work was being performed.

Wilander and his crew sometimes assisted in the navigational functions of the vessel. Plaintiff's Exhibit 16[1] depicts Mr. Wilander actually piloting the JARAMAC 25, another boat utilized by McDermott in these operations in the Persian Gulf.

SUMMARY OF ARGUMENT

American law provides the applicable rule of decision in this case, involving an American citizen injured while serving as a member of the crew of an American flag vessel. *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953).

The test of seaman's status to be applied in this case is set forth in the decision of *Barrett v. Chevron U. S. A., Inc.*, 781 F.2d 1067 (5th Cir. 1986)

There exist no circumstances in this case which would justify the modification by this Court of the *Barrett* rule. *Lormand v. Aries Marine Corporation, et al*, 820 F.2d 1222 (5th Cir. 1987), cert. den. 484 U.S. 1031, 108 S.Ct. 739, 98 L.Ed.2d 774 (1988); *International Oilfield Divers, Inc., et al v. Lonnie Pickle, et al*, 791 F.2d 1237, 795 F.2d 1009 (5th Cir. 1986), cert. den. 479 U.S. 1059, 107 S.Ct. 939 (1987).

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1. Attached hereto on Page A-1

ARGUMENT

McDermott International has characterized the issue presented for review by this Court as being two-fold, to-wit:

1) Which definition of seaman's status should be adopted by the Fifth Circuit Court of Appeal in reviewing this case, and

2) Did the Fifth Circuit err as a matter of law in applying American law in this case?

With regard to the second question, the brief of petitioner does not allege, as required by Rule 17, that the decision as to choice of law made by the Fifth Circuit and the district court in this case is in conflict with that of any other circuit, or is so far departed from the accepted course of judicial proceedings, as to justify the exercise of this Court's supervisory powers. In fact, the facts of this case presented a much more significant connection with the United States than alleged by McDermott International. The reason McDermott International failed in their quest to prevent the application of American law to this case is the fact that they were never able to demonstrate that any other country had a more substantial interest in the application of its own law than did the United States. This is the analysis required by such cases as *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) and *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980). The nationality of the injured worker "has always been viewed as a relevant and important consideration in determining the appropriate law to apply," (Phillips, supra, at p. 89), and even if no other factors show

ing a substantial interest were present, the mere fact that Wilander was found to be a seaman as to an American flag vessel would support the application of American law. *Lauritzen*, supra, 345 U.S. at 585; 73 S.Ct. at 929.

McDermott Intenational has argued on five separate occasions that Wilander did not meet the test of seaman's status set forth by the Fifth Circuit Court of Appeal in *Barrett v. Chevron U. S. A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) - before the jury, before the trial judge (by motion for summary judgment, motion to strike Jones Act claim and motion for judgment on findings of the jury), and before the Fifth Circuit itself. In the Fifth Circuit, McDermott even had the good fortune of having two members of the panel who had been among the dissenters in *Barrett*. Having failed in this mission every time, McDermott now argues that the incorrect test was applied, and the Seventh Circuit rule of *Johnson v. John F. Beasley Construction Company*, 742 F.2d 1054 (7th Cir. 1984) should be applied to this case.

McDermott's claim of the "current tension in the Fifth Circuit" with regard to the standard to be used in determining status is misplaced. The rule of *Pizzitola v. Electro-Coal Transfer*, 812 F.2d 977 (5th Cir. 1987), cert. den. 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), excluding those workers covered by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 USC 901, et sub from Jones Act coverage applies *only* when the "employee is engaged in an occupation expressly enumerated in the Act." *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 296 (5th Cir. 1987); *Thibodeaux v. Torch, Inc.*,858 F.2d 1048 (5th Cir. 1988). McDermott cites no authority for the proposition that *Barrett* does not remain the Fifth Circuit rule, and the opinion of the Fifth Circuit in the instant case reiterates the continuing viability of *Barrett*.

Therefore, it is clear that the Fifth Circuit has applied the same test for determination of seaman's status since the decision of *Offshore Company v. Robinson*, 266 F.2d 769 (5th Cir. 1959), to-wit:

> There is an evidentiary basis for a Jones Act cae to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

This evidentiary basis was present in this case.

As pointed out by McDermott, this court has declined to address the question of whether the *Barrett/Robison* rule should be modified, in *Lormand v. Aries Marine Corporation, et al*, 820 F.2d 1222 (5th Cir. 1987), cert. den. 484 U.S. 1031, 108 S.Ct. 739, 98 L.Ed.2d 774 (1988) and *International Oilfield Divers, Inc., et al v. Lonnie Pickle, et al*, 791 F.2d 1237, 795 F.2d 1009 (5th Cir. 1986), cert. den. 479 U.S. 1059, 107 S.Ct. 939 (1987). There are certainly no circumstances which would justify the granting of a writ of certiorari present in this case which were absent in those cases.

In fact, this is a particularly inappropriate case for resolution of any possible conflict between the circuits regarding the test for seaman's status, since:

1) There is an evidentiary basis in this case for a finding that Wilander satisfied *both* the *Barrett/Robinson* test *and* the *Johnson* test. (See Exhibit 16, attached.)

2) There is no conflict presented between the application of either the LHCA or the Outer Continental Shelf Lands Act (OCSLA), 43 USC 1331, et sub and the Jones Act, since neither the LHWCA nor the OCSLA has any application to this case.

3) As an American seaman working for from home in a strange land, spending *all* of his working hours facing the perils of the sea, Wilander is in dire need of the "special solicitude" to be accorded seaman by the courts of admiralty. *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

CONCLUSION

This man was injured on July 4, 1983. His case is currently set to be retired in the United States District Court on May 29, 1990. (A new trial was ordered by the Fifth Circuit, although not requested by Wilander, due to an error of the lower court in the admission of certain evidence favorable to McDermott.) The Jones Act is to be liberally construed so as to achieve maximum coverage. *In Re Industrial Transporation Corp.*, 344 F.Supp. 1311, 1317 (E.D.N.Y. 1972), and cases cited therein. We would strongly urge this Honorable Court to deny the application for writ of certiorari made by McDermott International in this case, so that this seaman may, finally, be granted the relief

to which he is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari of McDermott International, Inc. has this day been served upon counsel of record by placing same in the United States mail, postage prepaid and properly addressed as follows:

Mr. James B. Doyle
Voorhies & Labbe
P. O. Box 3527
Lafayette, LA 70502

Cameron, Louisiana; May _____, 1990.